



The Competitive Carriers Association

Rural Cellular Association

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October 13, 2011

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: CC Docket No. 01-92; WC Docket No. 10-90; WC Docket No. 07-135; WC
Docket No. 05-337; GN Docket No. 09-51**

Dear Ms. Dortch,

On October 11, 2011, RCA; Ben Moncrief via teleconference, Public Policy Manager for C Spire Wireless; Kevin Joseph, on behalf of C Spire Wireless; and David La Furia on behalf of U.S. Cellular, met with Zac Katz, Chief Counsel and Senior Legal Advisor to Chairman Genachowski; Ruth Milkman, Special Counsel to Chairman Genachowski; Sharon Gillett, Chief of the Wireline Competition Bureau; Carol Matthey, Deputy Bureau Chief of the Wireline Competition Bureau; Rebekah Goodheart, Associate Bureau Chief of the Wireline Competition Bureau; Patrick Halley, Legal Advisor in the Wireline Competition Bureau; Jim Schlichting, Senior Deputy Bureau Chief of the Wireless Telecommunications Bureau; Margaret Wiener, Division Chief of the Auctions and Spectrum Access Division; and Michael Steffen, Special Counsel in the Office of General Counsel, to discuss Chairman Genachowski's proposed Universal Service Fund ("USF") and Inter-carrier Compensation Reform Order and related Notice of Proposed Rulemaking. RCA remains concerned about many aspects of the Chairman's reform proposal, particularly the wholly inadequate size of the proposed Phase I and Phase II Mobility Funds.¹ This *ex parte* notice, however, focuses on the proposed immediate withdrawal of current USF support and the economic and legal risks this poses.

We write to underscore RCA's paramount interest in ensuring that contemplated reforms of the USF support mechanisms do not prematurely withdraw existing high-cost funding before sufficient support is available from the planned Connect America Fund and Mobility Fund. The Commission's own broadband deployment goals, as well as key legal constraints under the Communications Act of 1934, as amended (the "Act") and the Administrative Procedure Act

¹ Letter of Rebecca M. Thompson, General Counsel, RCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.*, at 1 (filed Sept. 27, 2011) ("RCA Sept. 27 Ex Parte").

(“APA”), require a stable and predictable source of funding throughout the transition from narrowband to broadband-oriented support mechanisms.

In numerous filings and meetings with the Commission, RCA and its members have advocated in support of competitively and technologically neutral support mechanisms that appropriately account for consumers’ strong preference for mobile wireless services. We have expressed deep concerns regarding the “ABC Plan” proposed by incumbent local exchange carriers (“ILECs”), arguing that the Commission should reject self-serving measures designed to protect wireline carriers’ interests and instead rely on forward-looking cost models to allocate support to those carriers that can preserve and advance universal service most efficiently.² At the same time, despite RCA’s belief that a single, integrated broadband support mechanism would best serve the public interest, we have advanced compromise proposals that would rely on a separate funding mechanism for mobile wireless services.³ As the Commission enters the home stretch of its efforts to modernize the high-cost USF program, our most pressing priority is to avoid a funding gap that would undermine rural investment and directly undercut the consensus goals embodied in the National Broadband Plan and the Commission’s *USF Transformation NPRM*.⁴

RCA has argued for substantially more Mobility Fund support than the ABC Plan contemplates, and we remain concerned that proposals under consideration understate the significant funding needs for wireless carriers to deliver affordable, high-quality services to consumers in high-cost rural areas.⁵ But whatever the ultimate fund size, the Commission should ensure that it does not withdraw *existing* high-cost support for wireless carriers before it adopts a final order and begins administering adequate replacement mechanisms.

As an initial matter, a premature withdrawal of wireless support would undercut the Commission’s core interest in “mak[ing] affordable broadband available to all Americans”

² See, e.g., Reply Comments of the Rural Cellular Association, WC Docket No. 10-90 *et al.* (filed Sep. 6, 2011); Comments of the Rural Cellular Association, WC Docket No. 10-90 *et al.* (filed Aug. 24, 2011); Letter of Rebecca M. Thompson, General Counsel, RCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (filed Aug. 3, 2011).

³ See RCA Sept. 27 Ex Parte at 2; Reply Comments of the Rural Cellular Association, WC Docket No. 10-90 *et al.*, at 8-9 (filed May 23, 2011).

⁴ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (“*USF Transformation NPRM*”).

⁵ Whereas the ABC Plan called for \$300 million in annual support for wireless and satellite providers—and only in extremely high-cost areas—RCA has indicated that an annual target of \$1.5 billion would be more appropriate for the Mobility Fund, although \$800 million in ongoing annual support might be sufficient if the largest wireless carriers and rural LECs were barred from participating. See RCA Sept. 27 Ex Parte at 2.

through USF reform.⁶ Eliminating existing high-cost support for wireless carriers before a new support mechanism has been implemented would undermine those carriers' ability to maintain current voice and broadband services, and also prevent them from carrying out plans to build out next-generation broadband networks. Several of RCA's members, including Allied Wireless, U.S. Cellular, and C Spire Wireless, have explained to the Commission how such a withdrawal could disrupt current 2G and 3G service throughout their service areas, force the decommissioning of cell sites, and preclude the continued expansion of networks to meet consumer demand.⁷ RCA's members have made these investments—and are planning to undertake future investments—with the expectation of receiving USF support for areas where there is no business case to deploy voice and broadband services based solely on retail revenue. Just as ILECs repeatedly point to the possibility of “stranded investments” as a justification for continued support,⁸ wireless providers would face the same prospect if high-cost funding were withdrawn before a new ongoing mechanism with sufficient support is put in place. Given the Commission's clear focus on bolstering broadband investment and adoption, the last thing the Commission should do is inject debilitating uncertainty that would force wireless providers to scale back existing deployment plans. Additionally, adherence to principles of competitive neutrality requires that phase down of wireless support be no more burdensome than phase down of ILEC support.

In addition to these critical policy concerns, the premature withdrawal of wireless support would be unlawful. As noted above, withdrawing the funding on which the build-out plans of wireless providers rely is not a rational means of advancing the Commission's broadband deployment goals. To the contrary, wireless carriers' investment in rural communities in reliance on existing high-cost support requires the Commission to advance a particularly strong justification for reversing course. Under the Supreme Court's recent decision in *FCC v. Fox Television Stations*,⁹ the Commission would need to “provide a more detailed justification than what would suffice for a new policy created on a blank slate,” because “its prior policy has engendered serious reliance interests that must be taken into account”—specifically, the reliance interests of wireless carriers and consumers who depend on existing support levels.¹⁰ The Supreme Court warned in that case that “it would be arbitrary and capricious to ignore such matters,”¹¹ and here too the Commission must account for the critical reliance interests of wireless providers as it shifts to a new annual wireless funding mechanism.

⁶ *USF Transformation NPRM* ¶ 10.

⁷ Letter of Rebecca M. Thompson, General Counsel, RCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.*, at 2 (filed Oct. 7, 2011).

⁸ See Joint Comments of AT&T, CenturyLink, FairPoint, Frontier, Verizon, and Windstream, WC Docket No. 10-90 *et al.*, at 13 (filed Aug. 24, 2011) (asserting an interest in “avoid[ing] the equitable and legal concerns that would arise from stranded LEC investments”).

⁹ *FCC v. Fox Television Stations*, 129 S. Ct. 1800 (2009).

¹⁰ *Id.* at 1811.

¹¹ *Id.*; see also *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996) (“Sudden and unexplained change, or change that does not take account of legitimate reliance on

The withdrawal of existing wireless support without an adequate ongoing replacement mechanism in place also would violate the requirement in Section 254 of the Act that USF support mechanisms be “specific, predictable and sufficient.”¹² The Commission has acknowledged that the “specific” and “predictable” requirements apply to mechanisms for distributing USF support, conceding that the Fifth Circuit’s *Alenco* decision compels that interpretation.¹³ By eliminating or phasing down wireless support before a new annual funding mechanism is in place, the Commission would sacrifice the predictability principle and leave wireless carriers stranded in their ability to fund both ongoing operations and future build-out plans. By the same token, the Commission cannot discharge its duty to provide sufficient support if it withdraws existing funding before reaching final decisions on the size, distribution methodology, and other critical aspects of the planned broadband support mechanisms.¹⁴

RCA urges the Commission to faithfully discharge these statutory duties by finalizing and commencing implementation of its plan for transitioning wireless carriers to Mobility Fund and Connect America Fund support *before* phasing down current high-cost USF support. Wireless carriers require this certainty in order to ensure continued service to consumers, to forecast their financial commitments, and to make any necessary adjustments to future build-out plans. Withdrawing high-cost support without a fully realized transitional model in place would erode the competitiveness of wireless providers, undermine the Commission’s broadband deployment goals, harm rural consumers, and contravene the requirements of the Act and the APA.

This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission’s Rules. Please contact us with any questions.

Sincerely,

/s/

Steven K. Berry, President & CEO
Rebecca M. Thompson, General Counsel
RCA—The Competitive Carriers Association

prior interpretation, may be arbitrary, capricious, or an abuse of discretion.”) (internal quotation marks and citations omitted).

¹² 47 U.S.C. § 254(b)(5); *see also id.* § 254(d).

¹³ *See* Brief of Respondents, *Rural Cellular Ass’n v. FCC*, No. 11-1094, at 54 (D.C. Cir., filed Sept. 29, 2011) (citing *Alenco Commc’ns Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000)).

¹⁴ *See Qwest Corporation v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (reversing order establishing non-rural support mechanism because the Commission failed to “explain[] how its funding mechanism [wa]s sufficient”).